—IN THE—

UNITED STATES CIRCUIT COURT

OF APPEALS

FOR THE

NINTH CIRCUIT.

Chester H. Kiehl, as Receiver of The South Bend Water Company,
Plaintiff in Error.
vs.
The City of South Bend,
Defendant in Error.
No.....

BRIEF OF DEFENDANT IN ERROR.

JOHN T. WELSH and F. S. THORP,
Attorneys for Defendant in Error.

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MOTION TO DISMISS WRIT OF ERROR.

Comes now the defendant in error and moves the Court to dismiss the writ of error, sued out herein, and affirm the judgment of lower court for the following reasons:

I.

Because the Court has not now, and never had, jurisdiction of the subject matter of this action, nor of the defendant in error herein.

II.

Because the pleadings and record on file herein does not show the plaintiff in error and defendant in error to be citizens of different states, nor of foreign states.

III.

Because this is a civil action arising upon an alleged contract between citizens of the State of Washington, and there is no federal question involved herein.

In support of this motion, defendant in error submits the record herein.

JOHN T. WELSH and F. S. THORP,
Attorneys for Defendant in Error.

ARGUMENT ON MOTION TO DISMISS.

The above are the same reasons for which a motion to dismiss was made in lower court by Mr. Welsh, attorney for defendant in error. (See page 50 of Record.)

Defendant in error has not waived the right to question the jurisdiction of the Court by proceeding to trial, as it was forced to trial over its objections.

In support of this proposition we submit:

"A general appearance does not waive an objection to the jurisdiction of the Court upon the ground of lack of the requisite difference of citizenship, but same may be raised at any stage of the proceedings."

Foster's Fed. Pr. Sec. 101.

Romaine vs. Union Ins. Co. 28 Fed. Rep. 625.

Beach on Modern Eq. Pr. Sec. 33.

Masham & L. R. Co. vs. Boston, 136 U. S. 336.

U. S. Revised Statutes 1 Supp. 173-175.

18 U. S. Statutes at Large 470.

The record herein does not show any fact to give the court jurisdiction. There is no averment in the pleadings that the Receiver of said Water Company is not a citizen of the State of Washington. But the pleadings do show that the Water Company and the City of South Bend are both corporations of the State of Washington, one a private, the other a municipal —hence both citizens of the same state. While as to the citizenship of the Receiver, who brought the action and who is plaintiff in error herein, the pleadings and record are as silent as the tomb, from which no tongue utters speech.

We contend that to give the U. S. Circuit Court jurisdiction, when no federal question is involved,

the pleadings should aver that the Receiver is a citizen of a different state from the defendant, otherwise the Court is without jurisdiction, and should of its own motion dismiss the action.

The authorities hold, that in an action in a federal court, brought by a Receiver, it is the personal citizenship of the Receiver that is to be regarded, and that if the Receiver and the defendant are citizens of the same state, the federal court is without jurisdiction, and it is its duty to dismiss the action.

"A Receiver is a representative as much as an executor, and his personal citizenship will be regarded as a motion to remand the cause to the state court."

Foster's Fed. Pr. Sec. 19.

Davies vs. Lathrop as Rec., 12 Fed. Rep. 353.

Beach Modern Equity Pr. Vol. 1, Sec. 32.

Dillon on Rem. of Causes, Sec. 101.

Rust vs. Brittle Silver Co., 58 Fed. Rep. 611.

"A court will of its own motion take cognizance of the citizenship of the parties."

Cameron vs. Hodges, 127 U. S. 322.

Robertson vs. Cease, 97 U. S. 646.

Godfrey vs. Terry, 97 U. S. 171.

"The jurisdiction of the U. S. Courts, when it is based on the jurisdiction of the parties, depends upon the citizenship of the party to the record."

"When the jurisdiction of the United States courts depends upon the citizenship of the parties, it has reference to the parties as persons."

Bonafee vs. Williams 3 How. 574.

Amory vs Amory 95 U. S. 187.

"The decisions of this court require that the averment as to the citizenship of the parties must be clear and positive to give the court jurisdiction, and in a case of a defective averment as to citizenship, the case will be dismissed."

James Brown vs. Keene 8 Peters 112-114.
141 U. S. page 657.
31 Fed. Rep. 377.

Beach on Receivers, Sec. 663-666, says:

"The Receiver of a United States court has no greater power to bring suits than one appointed by a state court."

"An act of Congress gives the right to sue a receiver, appointed by U. S. courts, in a state court, and this court will not entertain the suggestion that its receiver will not obtain justice in the state courts."

Trust Company vs. Railway Co. 40 Fed. Rep. 426.
Central Trust Co vs. St. Louis A. & T. Co. 41 Fed. 551.

In the 53 Federal Reporter, on page 307, is reported a case where a Receiver of a railroad was sued in his official capacity for causing death by wrongful

act, and the cause was removed on his motion, although the R. R. company was a citizen of the same state as plaintiff, because the court held, that the personal citizenship of the receiver as to jurisdiction would be regarded.

The objection to jurisdiction on account of diverse citizenship may be made at any time, and it is the duty of the court to *sui sponte*, of its own motion look in the jurisdiction, and if it is without the same dismiss under the United States Statutes.

Beach on Modern Eq. Pr. Vol. 1 Sec. 33.

We respectfully submit that the motion to dismiss should be sustained.

JOHN T. WELSH and F. S. THORP,
Attorneys for Defendant in error.

STATEMENT OF CASE BY DEFENDANT IN ERROR.

The defendant in error, the City of South Bend, is a municipal corporation of the 3rd class, situate in Pacific county, Washington.

The plaintiff in error is a corporation, organized under and existing by virtue of the laws of the State of Washington.

On the 3rd day of April, 1893, the Council of said City of South Bend, passed an ordinance, No. 118, and entitled: "An ordinance authorizing The South Bend Water Company, its successors and legal representatives and assigns, to construct, maintain and operate water works, to supply the City of South Bend, Washington, and its inhabitants with water, and contracting with said City of South Bend for water for fire protection and other public purposes, and repealing Ordinance No. 100 relating thereto."

The said ordinance, No. 118, provided that the South Bend Water Company would construct, maintain and operate 25 hydrants, and supply said City with water for fire protection for a period of 30 years, at the rate of $7.50 per month for each hydrant. Payment to be made monthly in warrants drawn on the general fund of said City.

Said ordinance did not provide for its submission to the vote of the people of said City, nor has the same, in fact, ever been submitted, or attempted, or pretended to be submitted to a vote of the people of said city; and the same never received the assent of three-fifths of the voters of said City, voting at an election held for that purpose, or at all.

Nevertheless, the said Water Company erected 24 hydrants and supplied said City with water for the months of September, 1893, to November 1st, 1894, a period of 14 months.

The said City, as provided in said ordinance, and before the commencement of this action, made, executed and delivered unto the said Water Co. and to its Receiver, warrants upon the general fund of said City, in payment of water rentals for the months of September, 1893, to March, 1894, both inclusive, a period of 7 months, and in the aggregate the sum of $1260.00. And the said Company and its Receiver received the said warrants, and now have them, and the first 8 causes of action in plaintiff's complaint is for rentals for the months for which they received said warrants. (For said ordinance No. 118, see page 57 of Record.)

For the months of April, 1894, to October, 1894, both inclusive, no warrants have been issued. On or about May 23rd, 1894, in a certain suit in the U. S. Circuit Court at Tacoma, Wash., wherein Horace Phillips was complainant and the said South Bend Water Company was defendant, and which said suit was for the foreclosure of a mortgage given to said Horace Phillips, by said Water Company, Chester H. Kiehl was appointed a receiver of said Company.

Subsequently and on or about December, 1894, the said Chester H. Kiehl, as Receiver of said Water Company, commenced an action at law in said Circuit Court against the defendant in error, for water

rentals alleged to be due said Company for the months of September, 1893, to October, 1894, both inclusive. There are 15 causes of action in plaintiff's complaint, being for 14 months' water rental; and the first 8 causes of action, in said complaint, are for the months of September, 1893, to March, 1894, both inclusive, being the months for which said warrants on the general fund of said City were issued to and received by the said Water Company and its Receiver. The City of South Bend, defendant in error herein, filed an answer unto the complaint of plaintiff in error herein, in which said answer, the City denied specifically that it was indebted to the plaintiff for water rental or otherwise in any sum whatever, or at all. And set up among others the following separate defenses to the first cause of action alleged in said complaint:

VI.

That on the 3rd day of April, 1893, the City of South Bend, defendant herein, passed an ordinance, entitled, "An ordinance authorizing the South Bend Water Company, its successors and legal representatives and assigns to construct, maintain and operate water works to supply the City of South Bend, Washington, and its inhabitants with water for fire protection and other purposes, and repealing ordinance No. 100 relating thereto."

That as provided therein, plaintiff did within the time therein limited and in the manner therein prescribed avail itself of the provisions of said pretended ordinance, whereupon the said pretended

ordinance, became and constituted a pretended contract between the plaintiff and defendant. That the City of South Bend, on the said 3rd day of April, 1893, and for a long time prior thereto, was and from said 3rd day of April, 1893, up to the time of the commencement of this action, continued to be, and still is, otherwise indebted in an amount exceeding one and one-half per centum of all of the taxable property in the City of South Bend, defendant herein, ascertained from the last assessment in said city prior to the said 3rd day of April, 1893, for city purposes; and hence has no power to incur the obligation set forth in said first cause of action, but that said pretended ordinance and said pretended contract were and are wholly unconstitutional and void and utterly and entirely inoperative for any purpose and of no valid force whatever.

That though the indebtedness of said defendant before and at the time and ever since the 3rd day of April, 1893, over and exclusive of the amount of indebtedness which might arise under said pretended ordinance and contract, was and still is far exceeding one and one-half per centum of all the taxable property in said City of South Bend, as ascertained from the last assessment in said city prior to the said 3rd day of April, 1893, for city purposes, yet the said pretended ordinance did not provide for its submission to the vote of the people of said city, nor has the same in fact ever been submitted, or attempted, or pretended to be submitted to a vote of the people of said city, nor has said pretended ordinance or contract

ever received the assent of three-fifths of the voters of said city voting at any election held for that purpose.

That no ways or means were provided in said pretended ordinance for the payment of the debts or liabilities therein attempted to be created or which might arise thereunder or the pretended indebtedness mentioned in plaintiff's first cause of action,

For a further and separate defense to the first cause of action in plaintiff's complaint contained, the defendant alleges:

VII.

That the indebtedness of said City of South Bend, before and at the time and ever since October 1st, 1893, over and exclusive of the amount of the indebtedness set forth and contained in said first cause of action, was, ever since has been, and still is far exceeding one and one-half per centum of all taxable property in the City of South Bend, as ascertained from the last assessment in said city prior to said first day of October, 1893, for city purposes; that though the indebtedness of said city, before and at that time and ever since October 1st, 1893, over and exclusive of the amount of indebtedness set forth in said first cause of action, was and still is far in excess of one and one-half per centum of all of the taxable property in said City of South Bend, as ascertained from the last assessment in said city prior to October 1st, 1893, for city purposes, yet the said indebtedness set forth in plaintiff's first cause of action, has never been submitted nor

pretended to be submitted to a vote of the people of said city nor has said pretended indebtedness ever received the assent of three-fifths of the voters of said city voting at an election held for that purpose.

For a further and separate defense to said first cause of action, defendant alleges:

VIII.

That there is not now and never has been any money in the treasury of said city that could be applied in payment of the pretended indebtedness set forth in said first cause of action, or to pay any indebtedness which might arise under said pretended ordinance and contract.

For a further and separate defense to said first cause of action, defendant alleges:

IX.

That the current revenues of said city for the fiscal year 1893, and up to the next regular assessment for city purposes thereafter did not exceed the sum of four thousand five hundred forty three dollars and twenty cents; that prior to the said first day of October, 1893, all and every part of said sum had been and was appropriated and paid out of the treasury of said city on other legal indebtedness and obligations against said city, and at the time of the accruing of said pretended indebtedness set forth in said first cause of action, there were no current revenues of said city that could be or were appropriated for the payment of said pretended indebtedness.

For a further and separate defense to said first cause of action, defendant alleges:

XI.

That on the 17th day of October, 1893, at South Bend, Washington, defendant made and executed and on the 13th day of November, 1893, delivered to said plaintiff according to the terms of said pretended ordinance and contract a warrant upon the general fund of said city for the sum of $180.00 in discharge of the pretended indebtedness set forth in said first cause of action, and said plaintiff at the time of said delivery aforesaid accepted said warrant in full satisfaction and discharge thereof.

And to each cause of action after the first in said complaint, the same defenses with appropriate changes of dates, were plead. Plaintiff filed a reply being practically a general denial of the matter plead in answer. (See page 24 of Record.)

Whereupon, issues joined, the case was called for trial on the 26th day of February, 1895, and the defendant below, by its attorney, John T. Welsh, in open court, moved the court to dismiss the action at the plaintiff's costs, for the following reasons:

I.

Because the court has not now, and never had jurisdiction of the subject matter of this action, nor of the defendant.

II.

Because the pleadings on file herein do not show

plaintiff and defendant to be citizens of different states, nor of foreign states.

III.

Because this is a civil action arising upon an alleged contract between citizens of the State of Washington, and there is no federal question involved herein.

The court overruled the motion, and defendant excepted. (See page 50 of Record.)

The plaintiff and defendant then signed and filed a stipulation in writing (See page 31 of Record) to try the case before the court, without a jury. The court took the matter under advisement, and on the 2nd day of December, 1895, filed its findings of fact and conclusions of law in writing in the case, and in accordance therewith ordered that judgment be entered in favor of defendant. On the 3rd day of December, 1895, a judgment was accordingly signed and entered.

From which judgment plaintiff in error has sued out a writ of error to this court.

ARGUMENT UPON THE MERITS.

We submit that the judgment of the lower court was correct. That it could not have found or decided otherwise.

Its judgment dismissing the first 7 causes of action in plaintiff's complaint, because the Water Company and its receiver had received warrants for the months sued on in said counts, was right, the court could not have done otherwise—it construed and declared the law as it found it.

Let us reason together for a moment:

For the months of September, 1893, until March, 1894, both inclusive, a period of 7 months, the Water Company, and its receiver, before the commencement of this action, received and had at the time of the trial of the action 7 warrants in sum of $180.00 each, aggregating $1260.00. Which said warrants were issued on the general fund of said city, in manner and form and as required by the alleged contract or ordinance, upon which plaintiff in error based and bases his action.

Plaintiff in error admits, both in his pleadings and evidence, that for said months warrants were issued to, and received by the Water Company and its receiver.

Here is the evidence:

Horace Phillips cross examined by Mr. Welsh.

Q. Are you a member of of the South Bend Water Company?

A. I am.

Q. State if you know how many warrants have been issued to and received by the South Bend Water Company for these 14 months.

A. Well, they have been received by me, my understanding is that they were received for eight months.

Q. For eight months in the sum of $180.00 each?

A Well, they have been divided, I have handled them, but I have made no special record of them.

Q. But warrants for the eight months have been issued?

A. That is my understanding of it, yes.

Q. Look at the papers I hand you and state if these are the warrants issued to the South Bend Water Company?

A. That is what they purport to be, and that is what they are accepted for.

Mr. Shepard: We admit those are the warrants that represent the months from September, 1893, to March, 1894, both inclusive. (See evidence of Horace Phillips, pages 62-68 of Record.)

The warrants were offered and admitted in evidence by plaintiff, and were and are marked Exhibit C. (See pages 63 and 64 of Record.)

Section 10 of Ordinance No. 118, being the pretended ordinance or alleged contract upon which plaintiff brought his action, provides that payment to the Water Company for water rental shall be made monthly in warrants drawn on the general fund of

said city. The Water Company claims to have supplied the city with water for fire protection, through 24 hydrants, at $7.50 per hydrant per month. This amounts to $180.00 per month. (See Section 10 of Ordinance, on Page 59 of Record.)

The City of South Bend, complying with the alleged contract, made, executed and delivered unto the said Water Company and its receiver, warrants for the water rented for said months of September, 1893, until March, 1894, both inclusive. The company accepted and received them before the commencement of this action, they were introduced in evidence at the trial in lower court. Yet the receiver of the Water Company, and while he had and still has in his possession, warrants in full payment for water rental for said months, and although he could under his alleged contract receive his compensation in no other manner, still he brings an action at law against the city for water rental for said months, as his first 7 or 8 causes of action, alleged in his complaint, are for the water rental for the months of September, 1893, to March, 1894, both inclusive. (See Complaint, page 6 of Record.)

Now what does the receiver want? His pretended contract calls for payment in warrants on the general fund of said city. He takes the warrants, yet he also wants, in addition thereto, a judgment by a court of law.

Shylock, who is held in contempt by all men, only demanded the fulfillment of his bond to its very letter, but the receiver of the South Bend Water

Company unblushingly and modestly demands more —he wails for a judgment. Such a proceeding, we submit, cannot be countenanced.

Suppose that the receiver obtained judgment against the city, what would it avail him? It is an elementary proposition of law, that an execution could not be issued against the property of the city, nor against the property of any of the citizens thereof, to satisfy the same.

Since an execution cannot issue to satisfy any judgment against a municipality, how is the same satisfied?

The law of the State of Washington answers that question, and it is as follows:

"If judgment be given for the recovery of money or damages against such county or other public corporation, no execution shall issue thereon for the collection of such money or damages, but such judgment in such respect shall be satisfied as follows:

1. "The party in whose favor such judgment is given may, at any time thereafter, when execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof to the officer of such county or other public corporation, who is authorized to draw orders on the treasury thereof.

2. "On the presentation of such transcript, such officer shall draw an order on such treasurer for the amount of the judgment, in favor of the party for

whom the same was given. Thereafter such order shall be presented for payment and paid with like effect and in like manner as other orders upon the treasurer of such county or other public corporation."

Section 674 of Hill's Code of Proc. of the State of Washington, being Vol. 2.

So even though a judgment was obtained by the receiver in this action, it would be paid in a warrant on the treasurer of said city, and as he now has warrants on the treasurer, what would or could a judgment avail him?.

If his warrants have not been paid and if he has presented same for payment and if they are legal, he has his remedy by mandamus to compel the treasurer to pay them.

Surely the receiver has mistaken his remedy, for if his contract is valid, which we do not admit, the warrants issued in compliance therewith are also valid, and he can enforce their payment, but not in an action at law. But if the contract is invalid, the warrants are also void.

If the receiver had brought an action of mandamus against the proper officers of the city to compel the payment of his warrants, the question as to their validity or invalidity could have been determined therein.

The Supreme Court of Washington has decided in the case of Cloud vs. The Town of Sumas, 9 Wash. St. 399, "That an action at law cannot be maintained

upon a warrant issued by a municipal corporation, evidencing its indebtedness to the holder, but the remedy of the holder, in case of the refusal of the treasurer of the corporation to pay the warrant in its order, is to proceed against the officers by mandamus. and in such proceeding questions affecting the legality of the warrant can be tried."

Cloud vs. Town of Sumas, 9 Wash. St. 399.

Such is the law of the State of Washington, and we assert that it will not be disputed, but what Federal courts take judicial notice of the laws of the state, where they are exercising their functions, and follow the decisions of the state court in matters arising under the law of a particular state. Although we do not deem it necessary to cite any authorities in support of the above proposition, yet we cite the following:

Furman vs. Nichol 8 Wall. 44.
Hinde vs. Vattier 5 Peters 398.
Cheever vs. Wilson 9 Wall. 108.
Lathrop vs. Stewart 5 McLean 167.
Owing vs. Hall 9 Peters 607-625.
Jasper vs. Porter 2McLean 579.
Miller vs. McQuerry 5 McLean 469.
116 U. S. 1.
12 Wall. 226.

We submit that the judgment of the court was proper, and that it committed no error in holding that for the months for which warrants were issued

to the Water Company and its receiver, that the receiver could not maintain an action at law, and that in so doing the receiver had mistaken his remedy.

But even if this court should hold that an action at law can be maintained for said months, yet that will not necessarily cause it to reverse the judgment, for the same separate defenses, which will hereafter be discussed, which were set up to the other causes of action alleged in plaintiff's complaint were also set up to the causes of action which were alleged for the months for which the warrants were issued. And the court found said separate answers to be true, and to be a complete defense to the action, and we are condent that this Court will also determine. (See Findings and Judgment of lower court, pages 32 to 41 inclusive of Record.)

The complaint of plaintiff, plaintiff in error herein, contains 15 causes of action, being for 14 months water rental from September, 1893, to October, 1894, both inclusive, and each cause of action is based upon a pretended contract or ordinance which the complaint alleges the Council of the City of South Bend passed on April 3rd, 1893. Said ordinance was passed by the Council of said city on the 3rd of April, 1893, and by its terms it specifically repealed a prior ordinance, No. 100, on same subject. As by terms of said ordinance No. 118, plaintiff in error in his complaint alleged and alleges that $180.00 was due him for water rental for each month, 24 hydrants at $7.50 per hydrant per month.

To the first cause of action in plaintiff's complaint, defendant in error in its answer set up the following separate defenses, and to each cause of action, after the first, the same separate defenses were plead to each cause of action after the first, excepting that to the last 8 causes, it was not plead that a warrant was issued to and received by the Water Co.

Defendant answering unto first cause of action alleges:

VI.

That on the 3rd day of April, 1893, the City of South Bend, the defendant herein, passed an ordinance entitled, "An ordinance authorizing the South Bend Water Company, its successors and legal representatives and assigns to construct, maintain and operate water works to supply the City of South Bend, Washington, and its inhabitants with water for fire protection and other purposes, and repealing ordinance No. 100 relating thereto."

That as provided therein plaintiff did, within the time therein limited and in the manner therein prescribed avail itself of the provisions of said pretended ordinance, whereupon the said pretended ordinance became and constituted a pretended contract between the plaintiff and the defendant.

That the City of South Bend, on the said 3rd day of April, 1893, and for a long time prior thereto, was, and from the said 3rd day of April, 1893, up to the time of the commencement of this action, continued

to be, and still is, otherwise indebted in an amount exceeding one and one half per centum of all of the taxable property in the city of South Bend, defendant herein, ascertained from the last assessment in said city prior to the said 3rd day of April, 1893, for city purposes; and hence has no power to incur the obligations set forth in said first cause of action, but that said pretended ordinance and said pretended contract were and are wholly unconstitutional and void, and utterly and entirely inoperative for any purpose and of no valid force whatever.

That though the indebtedness of said defendant before, and at the time and ever since the 3rd day of April, 1893, over and exclusive of the amount of indebtedness, which might arise under said pretended ordinance and contract, was and still is far exceeding one and one-half per centum of all of the taxable property in said city of South Bend, as ascertained from the last assessment in said city prior to the said 3rd day of April, 1893, for city purposes, yet the said pretended ordinance did not provide for its submission to the vote of the people of said city nor has the same in fact ever been submitted, or attempted or pretended to be submitted to a vote of the people of said city, nor has said pretended ordinance or contract ever received the assent of three-fifths of the voters of said city voting at an election held for that purpose.

That no ways or means were provided in said pretended ordinance for the payment of the debts or liabilities therein attempted to be created or which

might arise thereunder, or the pretended indebtedness mentioned in plaintiff's first cause of action.

For a further and separate defense to the first cause of action in plaintiff's complaint contained, the defendant alleges:

VII.

That the indebtedness of said city of South Bend, before and at the time and ever since October first, 1893, over and exclusive of the amount of indebtedness set forth and contained in said first cause of action, was, ever since has been, and still is far exceeding one and one-half per centum of all the taxable property in the City of South Bend, as ascertained from the last assessment in said city prior to said first day of October, 1893, for city purposes.

That though the indebtedness of said city before, at the time, and ever since October 1st, 1893, over and exclusive of the amount of indebtedness set forth in said first cause of action, was and still is far in excess of one and one-half per centum of all the taxable property in said city of South Bend, as ascertained from the last assessment in said city prior to October 1st, 1893, for city purposes yet the said indebtedness set forth in plaintiff's first cause of action, has never been submitted nor pretended to be submitted to a vote of the people of said city nor has said pretended indebtedness ever received the assent of three fifths of the voters of said city voting at any election held for that purpose.

For a further and separate defense to said first cause of action, defendant alleges:

VIII.

That there is not now, and never has been any money in the treasury of said city, that could be applied in payment of the pretended indebtedness set forth in said first cause of action or to pay any indebtedness which might arise under said pretended ordinance and contract.

For a further and separate defense to the said first cause of action, defendant alleges.

IX.

That the current revenues of said city for the fiscal year 1893 and up to the next regular assessment for city purposes thereafter did not exceed the sum of $4543.20; that prior to the said first day of October, 1893, all and every part of said sum had been and was appropriated and paid out of the treasury of said city on other legal indebtedness and obligations against said city, and at the time of the accruing of said pretended indebtedness set forth in said first cause of action, there were no current revenues of said city that could be or were appropriated for the payment of said pretended indebtedness.

For a further and separate defense to said first cause of action, defendant alleges:

X.

That the annual revenue of said city after meeting the necessary other liabilities of said city is

insufficient to meet the alleged and pretended indebtedness mentioned, in said first cause of action.

For a further and separate defense to said first cause of action, defendant alleges:

XI.

That on the 17th day of October, 1893, at South Bend, Washington, defendant made and executed and on the 13th day of November, 1893, delivered to said plaintiff, according to the terms of said pretended ordinance and contract, a warrant upon the general fund of said city for the sum of one hundred eighty dollars ($180.00) in discharge of the pretended indebtedness. set forth in said first cause of action, and said plaintiff, at the time of said delivery aforesaid accepted said warrant in full satisfaction and discharge thereof.

The materiality of said separate defenses is easily to be seen, as the constitution of the state of Washington provides:

"No county, city, town school, district, or other municipal corporation, shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness, at any time exceed five per centum on the value of the taxable property therein to be ascertained by the last assess-

ment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes."

Article VIII Sec. 6 of the constitution of the State of Washington.

The financial condition of the city was a matter of evidence for defendant to prove, which it did in support of the allegations of its separate defenses.

Plaintiff in lower court, the plaintiff in error here, admitted in evidence, at trial of action, that, in addition to all other indebtedness of said city, said city is indebted on an issue of $60,000.00 of bonds, which were voted on June 8, 1891, and that same were to run for a period of 15 years, and that ever since June 8, 1891, the same were, and still continue to be an indebtedness of said city. (For admission of Plff. in error, see page 68 and 69 of Record.)

The defendant in lower court, to save time and to simplify matters, and to save the trouble of introducing the whole host of books and public records of said city in evidence, prepared from said books and records, a schedule in writing, bearing on the financial condition of said city for sundry dates, and offered the same in evidence at the trial of said action, and by and with the consent and permission of plaintiff and his attorney, the same was filed in evidence, and marked defendant's exhibit I. (See pages 74 to 78 inclusive of Record.)

The plaintiff below, plaintiff in error here, also admitted that in addition to the said $60,000 bonded indebtedness the assessed valuation, outstanding indebtedness and other facts, bearing upon the financial condition of the defendant on April 3rd, 1893, and sundry other dates, were as they are set forth in the schedule prepared by the defendant, and filed herein.

Plaintiff in error also admitted in regard to paragraph No. VII. of the answer that the indebtedness of the defendant on October 1st, 1893,and all the taxable property in said city, according to the last assessment prior thereto, was as stated in said schedule above mentioned, and plaintiff admitted that the said ordinance was never submitted to a vote of the people, and never received the assent of three-fifths of the voters of said city voting at an election held for that purpose. or at all.

Plaintiff in error also admitted that the defendant has had an income for general city purposes as stated in the above mentioned schedule, and no more, and that said income has been applied either to the payment of lawful current expenses, or to the payment of lawful warrants for city purposes in the order of their issue from time to time, according as said income was received. And that there was no money in the city treasury for which a warrant for the water rentals for September, 1893, could be paid.

Plaintiff in error further admitted in regard to paragraph X. of answer that all the annual revenues

of the defendant from year to year are as stated in the above mentioned schedule.

Plaintiff in error also admitted that the warrant as pleaded in paragraph XI. of the answer was issued and delivered to Water Company, but he did not admit defendant's contention that it was issued and accepted in full discharge and satisfaction of the alleged indebtedness set forth in the first cause of action; and plaintiff made the same admission in reference to all the several causes of action, which are pleaded in the paragraphs of the answer from XII. to LXXXII. both inclusive, as he has made of the facts alleged in paragraphs VI. to XI. both inclusive, corresponding changes as to varying times and amounts being made, and the foregoing admissions and statements of fact, being applied to the respective defenses to each cause of action in turn, And the above mentioned schedule is to be taken as a statement of fact and evidence, as the same may be applicable to each cause of action or defense as the case may be.

Plaintiff in error also admitted that said city levied during each of the years 1893 and 1894, a 6 mills tax for general purposes. (For the above admission of plaintiff in error, see pages 66 to 69 inclusive of Record herein.)

We particularly call the court's attention to the admission made by plaintiff in error as in our opinion, he practically admitted all of the facts plead in defendant in error's answer to be true.

The said written schedule marked defendant's exhibit I is as follows:

Assessed valuation of all real and personal property in the City of South Bend, Wash., as equalized in 1892	$1,908,478 00
General fund warrants outstanding against the city of South Bend and not paid for want of funds on April 3d, 1893	15,640 64
Amount in the city treasurer's general fund April 3, 1893	730 56

The first payment became due Oct. 1st, 1893, under the first cause of action, and general fund warrant No. 511 was issued Oct. 17, 1893.

Amount of general fund warrants outstanding and unpaid for warrant of funds, and balance in the city treasurer's general fund on same dates on periods from Oct. 1, 1893, to Oct. 1, 1894:

Warrants outstanding Oct. 1, 1893	$21,628 46
Warrants outstanding Nov. 1, 1893	22,779 48
Warrants outstanding Dec. 1, 1893	22,959 48
Warrants outstanding Jan. 1, 1894	25,311 88
Warrants outstanding Feb. 1, 1894	25,824.63
Warrants outstanding Mch. 1, 1894	24,504 52
Warrants outstanding Apr. 1, 1894	28,081 69
Warrants outstanding May 1. 1894	26,725 40
Warrants outstanding June 1, 1894	26,394 40
Warrants outstanding July 1, 1894	26,542 89
Warrants outstanding Aug. 1, 1894	26,687 89
Warrants outstanding Sep. 1, 1894	26,692 89

Warrants outstanding Oct. 1, 1894 ..27,011 09
Warrants outstanding Nov. 1, 1894 .27,151 59

Also the amounts in the city treasurer's general fund upon the same dates:

City Treasury Oct. 1, 1893	$ 91 85
City Treasury Nov. 1, 1893	91 85
City Treasury Dec. 1, 1893	91 85
City Treasury Jan. 1, 1894	423 05
City Treasury Feb. 1, 1894	1,233 05
City Treasury Mch. 1, 1894	2,346 30
City Treasury Apr. 1, 1894	125 34
City Treasury May 1, 1894	243 49
City Treasury June 1, 1894	297 28
City Treasury July 1, 1894	491 35
City Treasury Aug. 1, 1894	491 35
City Treasury Sep. 1, 1894	541 06
City Treasury Oct. 1, 1894	589 58
City Treasury Nov. 1, 1894	589 58

Revenue for the fiscal year of 1893:

For licenses collected	$4,300 32
6 mill levy on assessed valuation	3,120 84
Total revenue for 1893	$7,421 16

Expenses of the city of South Bend Wash., for the year 1893:

Salaries of city officers for the year 1893	$ 2,800 64
Warrants issued to South Bend Water Co .	859 40
Other expenses	11,059 40
Total expense for year 1893	$14,791 44

Following amounts have been paid The South

Bend Water Co. by issue of general fund warrants on the different dates and accepted by them with the exception of the last one of May 1st, for $36.00:

August, 1893, No. 465	$139 40
September 19, 1893, No. 487	180 00
October 17, 1893, No. 511	180 00
November 28, 1893, No. 520	180 00
December 14, 1893, No. 534	180 00
January 9, 1894, No. 545	133 10
January 9, 1894, No. 546	46 90
February 6, 1894, No. 567	60 00
February 6, 1894, No. 568	120 00
March 6, 1894, No. 581	180 00
April 2, 1894, No. 598	180 00
May 1, 1894, No. 617	36 00

Revenue, city of South Bend, for the year 1894:

Amount collected for licenses	$1,272 65
6 mill levy on assessed valuation	3,151 54
Total revenue, year 1894	$4,424 19

Expenses of the city of South Bend, Wash., year 1894:

Salaries of city officers	$1,847 24
Warrants issued to South Bend Water Co.	756 00
Other expenses	1,210 10
Total expenses for year 1894	$3,813 34

Schedule of assessed valuation, indebtedness, annual revenue and expenditure for sundry years:

Date of assessment taking effect.	Equalized valuation.
May 29, 1891	$2,868,825 00

June 2, 1892	1,918,478 00
October 16, 1893	520,138 00
October 1, 1894	525,258 00

Indebtedness exclusive of $60,000 bonds:

1891 None known or then existing.

June 2, 1892	$10,456 86
April 3, 1893	15,640 64
October 16, 1893	21,628 46
October 1, 1894	27,011 09

Cash in city treasury on sundry dates as follows:

June 2, 1892	$421 13
April 3, 1893	730 56
October 16, 1893	91 85
October 1, 1894	589 58

General fund warrants issued from

January 1, 1892 to June 2, 1892	$6,170 16
June 2, 1892, to July 1, 1892	918 50
July 1, 1892, to October 16, 1893	17,542 61
October 16, 1893, to October 1, 1894	6,353 28

(See pages 74 to 78 inclusive of Record.)

As may be seen from above schedule the assessed valuation of said city for the year 1893 was $520,138.

Under the constitutional provision heretofore set out, the city was powerless to contract or incur an indebtedness for any purpose to exceed one and one-half per centum of the taxable property of said city. One and one-half per centum of $520,138.00 is $7,802.07.

And as the city was during all of said year indebted in the sum of $60,000 in outstanding bonds,

and in the sum of $21,628.46 in warrants drawn on its general fund and outstanding and not paid for want of funds as may be seen from said schedule, the total indebtedness of said city during each month of 1893, and during the whole year 1893, was $81,628.46 while the constitutional limit was and is $7,802.07. Hence, during the whole of said year 1893, the indebtedness of the city of South Bend, over and exclusive of the amount of the alleged indebtedness set forth and contained in plaintiff in error's complaint was and still is far in excess of one and one half per centum of all taxable property in said city, as ascertained from the assessment in and for said city for said year for city purposes. With its $60,000 bonded indebtedness and its $21,628.46 general fund indebtedness, making a total of $81,628.46, and a constitutional limit of $7,802.07 it was during the whole of said year indebted in excess of the constitutional limit in the difference between $81,628.46 and $7,802.07 which is $73,826.39.

Now as to the year 1894.

The assessed valuation of said city for said year as may be seen from said schedule was $525,258.00 and one and one half per centum of that sum is $7878.87. While the city's $60,000 bonded indebtedness added to its general fund indebtedness of $27,011.09 as evidenced by its outstanding warrants, unpaid for want of funds, as may be seen from said schedule, makes a total indebtedness of said city, during the whole of said year 1894 of $87,011.09. So the

city was during all of said year indebted in excess of the constitutional limit in the difference between $87,011.09 and $7,878.87 which is $79,132.22.

We first called the court's attention to the financial condition of the city for years 1893 and 1894 herein, because the pretended indebtedness, which plaintiff in error claims due him from city, is alleged in his complaint to have accrued in 1893 and 1894.

But we also contend that during the years 1891 and 1892, as well as the years 1893 and 1894, the city was indebted beyond the constitutional limit of 1½ per cent. of the taxable property in said city. Take $1,918,478.00 which was the assessed valuation of said city for 1892, the assessment taking effect June 2nd, 1892, as per said schedule, and one and one-half per centum of that sum is $28,777.17. The indebtedness of said city for said time was $60,000 in outstanding bonds, and in outstanding warrants on general fund on same date in the sum of $10,456.86, making a total of $70,456.86. So the city was during the year 1892 indebted beyond the constitutional limit of 1½ per centum, in the difference between the sum of $70,456.86 and $28,777.17, which is $41,679.69.

We have now called the Court's attention to the facts, they are before you; we now submit the law as we understand it, and in support of our position, we will cite numerous and respectable authorities.

ULTRA VIRES.

"The general principle of law is settled beyond controversy, that the agents, officers or even city

council of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which is against public policy."

Dillon on Mun. Corp. 4th Ed. Sec. 457 and 933.

Laker vs. Brookline, 13 Pick. 343.

Marsh vs. Fulton county, 10 Wall. 676.

Buffett vs. Troy & B. R. R. Co., 40 N. Y. 146.

"A municipal corporation may set up the plea of ultra vires or its own want of power under its charter or constituted statutes to enter into a given contract, or to do an act in violation or excess of its corporate authority."

Clark vs. Des Moines, 87 Am. D. 423.

McDonald vs. Mayor, 23 Am. Rep. 144.

Newbury vs. Fox, 5 Am. St. Rep. 830.

Mayor vs. Ray, 19 Wall. 468.

Brady vs. Mayor of New York, 20 N. Y. 312.

Sutro vs. Petit, 5 Am. St. Rep. 422 (Cal.)

Prince vs. City of Quincy. 44 Am. Rep. 785.

We are confronted with the ludicrous spectacle of a City Council and a certain Water Company forcing upon the City of South Bend a pretended ordinance, whereby they attempted to bind the city

for a period of 30 years to pay $7.50 per month per hydrant for 24 hydrants, without the consent and against the wishes of the people of said city. Can they do it in the face of a constitutional provision such as ours without the assent of the voters of the city, when the city was and is indebted beyond the constitutional limit of 1½ per centum, and to such an extent that it is impossible for it longer to bear the burden and exist?

Many of the courts of the various states of the Union hold, and have held, that the prohibition against the creation of indebtedness beyond a certain amount extends to and embraces debts incurred to be paid on a future day as well as those payable at once. Taking that view of the law, and it is sustained by the cases immediately following, then the City of South Bend became indebted on the 3rd of April, 1893, the time of the passage of ordinance No. 118, in the aggregate of $64,800.00, as 24 hydrants, at $7.50 per month for each hydrant amounts to $180.00 per month, and to the sum of $2160.00 per year, and to the sum of $64,800.00 for 30 years.

In the case of Coulson vs. Portland, Judge Deady takes that view of the law, and held that a contract incurring an indebtedness to be paid in future installments, was the immediate creation of an indebtedness in the aggregate: and he characterized any other construction as an "artificial and unlooked for construction of popular and plain terms and phrases."

And in the case of Smith vs. Newburgh, 76 N. Y. 130, the court held that "a lease for a long term of

years with rent payable semi-annually created an indebtedness of the aggregate amount at the time of the execution of the lease."

The following authorities maintain the same principle:

Vol. 15 Am. & Eng. Enc. of Law, page 1130.

Davenport vs. Kleinschmidt 6 Mont. 502.

Wallace vs. San Jose 29 Cal. 181.

Niles Water Works vs. Niles 59 Mich. 311.

26 North Western Rep. 525.

Salem Water Co. vs. Salem 5 Or. 29.

Culbertson vs. Fulton 127 Ill. 30.

Coulson vs. Portland, Deady (U. S.) 481, found in Vol. 6, of Federal cases and numbered therein 3275.

Smith vs. Newburgh 77 N. Y. 130.

In the case of Culbertson vs. Fulton, Supra, in discussing a contract for the construction of water works to be paid for in the future, the court said:

"By entering into the contract of Aug. 15, 1887 the city became indebted."

"The obligation entered into by the terms of the contract constituted such an indebtedness as is contemplated by the language of the constitution." "It cannot be said that the indebtedness did not come into being until the work was completed."

To the same effect are the following cases:

Law vs. People, 87 Ill. 385.

Prince vs. Quincy, 105 Ill. 138.
44 Am. Rep. 785.

The following cases hold and sustain the doctrine that debts payable in the future or upon the happening of some future event, as the rendition of services, or the delivery of property, are within such restrictions upon municipal indebtedness as well as debts presently payable.

Springfield vs. Edwards, 84 Ill. 626.
State vs. Medbery, 7 Ohio St. 522.
Erie's App. 91 Penn. St. 398.
State vs. Atlantic City, 49 N. J. L. 558.

But if this Court should hold that the said ordinance did not create an indebtedness in the aggregate sum, and that the contract for future supplies, to be paid for when received, does not create an indebtedness in the aggregate, and that the indebtedness did not arise only from month to month, and that each month that water was supplied at the end of the month there was an indebtedness for the amount which accrued for the water supplied during that month.

Still, even in that event, we believe that you will hold as Judge Hanford did in lower court; here is his language:

"The reason the city is not liable for the water that has been supplied after it became indebted in an amount exceeding the constitutional limitation is that by reason of the shrinkage in value of the taxable property within the city and the incurring of

the indebtedness and in carrying on the city, this indebtedness has been created; it has been created in two ways, by the incurring of debt and by the shrinkage in the value of the taxable property of the city. That does not necessarily invalidate the contract. It does incapacitate the city from performing the contract, while this excess of indebtedness continues. The city is unable to pay for the water according to its contract without violating the constitution of the state, and that situation having arisen, the provisions of the constitution are paramount to the obligations of the contract; and on that ground I hold that the city cannot be required to pay."

So if this court takes either view of the law relative to the time when the indebtedness accrued, that is whether it determines that the indebtedness was one in the aggregate at time of passage of ordinance, or whether it decides that the indebtedness only accrued from month to month, still we maintain that the city was and is indebted in excess of constitutional limit both at time of passage of ordinance, and when the water rentals from month to month became due. Hence the indebtedness for water rental is not a valid one, and cannot be enforced. It must be suspended. It cannot override the constitutional provision of this state.

"It is a well settled proposition of law that who ever contracts with a municipality must at his peril take notice of the powers conferred by its charter, and of the law governing the same, and whether the

proposed indebtedness is in excess of the limits thereby imposed."

Gutta Percha & R. Mfg. Co. vs. Ogalalla, 50 N. W. 513.

No one will dispute or controvert the contention, that where a contract is expressly prohibited or declared void by statute, retention of the fruits of such contract will not subject a municipal corporation to liability under the contract or on a quantam meruit.

Goose river Bank vs. Willow Lake School Twp., 44 N. W. 1002.

Niles Water works vs. Niles, 26 N. W. 525.

Prince vs. Quincy, 28 Ill. 490; affirmed in 128 Ill. 443.

Neither can it be said that the sum claimed by plaintiff in error could or can be paid out of the current revenues of said city, even though this Court should hold that the pretended debt for water rental would be lawful if it could be paid out of the current revenues of the city, for your attention has already been called to the fact that at time of trial of action plaintiff in error admitted that there was no money in the treasury of said city which could be applied toward the payment of the sum claimed for water rental, and that the current revenues of said city were insufficient to pay same. And as plaintiff in error admitted that during said years 1893 and 1894, the City of South Bend levied a tax of 6 mills on each dollar of its assessed valuation. Which under the law is all that it could or can levy for general pur-

poses. (See Hill's Code of Wash., Vol. 1 Sec. 636. Session Laws of 1893, page 103.) And yet after the city levied all that it lawfully could for general purposes, still by the solemn admission of plaintiff in error, the current revenues were and are insufficient to pay the alleged indebtedness claimed by plaintiff in error.

We submit that the Water Company and its receiver has no valid claim against the city for the reason that the alleged contract or pretended ordinance is in violation of the constitutional provision of the State of Washington. That the city was and is powerless to contract or to create an indebtedness for any purpose whatever without a vote of the people. The constitution of the state is a sacred instrument; it is the supreme law of the people, and can not be and courts should not permit its provisions to be construed out of existence, nor so contorted as to render its provisions absolutely ~~imperatory~~ nugatory and meaningless. The law as we understand it is:

"That an absolute constitutional prohibition against incurring indebtedness in any manner, or for any purpose, beyond certain limits, invalidates any contract raising the indebtedness above that limit, even though it pertains to the ordinary expenses of the government."

"And that a contract to pay a monthly rental for the use of water hydrants is a contracting of indebtedness within the meaning of a constitutional limitation, when the city is indebted beyond the prescribed limit, although the legal income from

taxation or otherwise would be sufficient to pay all current expenses including such rentals."

Prince vs. Quincy 105 Ill. 138.

Beard vs. Hopkinson 23 Lawyers Rep. Am. 402.

15 Kentucky 756.

24 South Western 872.

44 Am. Rep. 785

Prince vs. Quincy 128 Ill. 443.

Prince vs. Quincy 28 Ill. App. 490

Springfield vs. Edwards 84 Ill. 626.

Sackett vs. City of New Albany 88 Ind. 475. found in 44 Am. Rep. 467.

People vs. May 9 Colorado 80, 12 Pac. 840.

Nougnes vs. Douglass 7 Cal. 65.

Adams vs. East River Sar. Inst. 65 Hun. 145, affirmed in 136 New York 152.

Spilman vs. Parkersburg 35 W. Va. 605.

Barnard vs. Knox county 13 Lawyers Rep. Am. 244: 105 Missouri 282.

State vs. Earl 87 Mo. 246.

Hebard vs. Ashland Co. 55 Wis. 145, 12 N. W. 437.

Lake county vs. Rollins 130 U. S. 662 L. E. 1060.

Am. & Eng. Enc. of Law Vol. 15 P. 1128 and cases cited.

Dillon on Municipal Corp. Sec. 136, 21 North Eastern 768.

Council Bluffs vs. Stewart 51 Iowa 385.

East St. Louis vs. Flannigan 26 Ill. App. 449.

The above are all clearly in point and constitutional provisions similar to our own were construed by the courts, and the position of defendant in error sustained.

We submit that the facts found by Judge Hanford, the learned Judge who presided at trial of this case, are supported by the evidence, and that the judgment rendered herein was and is in harmony with the law, and is just and equitable.

The court could not have done otherwise from the evidence submitted to it, and that no error was committed.

We respectfully submit that the judgment of the lower court should be affirmed, and the writ of error sued out herein be dismissed.

Respectfully submitted,
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